

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT OLDHAM, JR,

No C 08-2340 VRW (PR)

Petitioner,

ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS

v

TOM FELKER, Warden,

Respondent.

_____ /

Robert Oldham seeks a writ of habeas corpus under 28 USC
Section 2254, which, for the reasons that follow, the court denies.

I

On April 5, 2004, an information filed in Alameda County
superior court charged petitioner with first degree murder in
violation of California Penal Code Section 187(a) and possession of
a firearm by a felon in violation of California Penal Code Section
12021(a)(1). Attached to the murder charge was an allegation that
petitioner had personally and intentionally discharged a firearm,
causing great bodily injury or death in violation of California

1 Penal Code Sections 12022.5(a)(1), 12022.53(b), (c) and (d). The
2 information also alleged that petitioner had suffered one prior
3 felony conviction. Doc #11, Ex 1 at 101-03.

4 On September 30, 2005, a jury found petitioner guilty on
5 both counts and found true the firearm allegation. Doc #11, Ex 1 at
6 386, 388-89.

7 On December 1, 2005, the trial court sentenced petitioner
8 to fifty years to life in prison, consisting of twenty-five years to
9 life for first degree murder and twenty-five years to life for the
10 personal and intentional discharge of a firearm causing death. The
11 court stayed a two-year term for possession of a firearm by a felon.
12 Doc #11, Ex 1 at 409-11.

13 On September 17, 2007, the California court of appeal
14 affirmed the judgment. Doc #11, Ex 6. On that same date, the court
15 also denied petitioner's request for state habeas relief on claims
16 of ineffective assistance of counsel and cumulative error. Doc #11,
17 Ex 6 at 44.

18 On December 19, 2007, the Supreme Court of California
19 denied review. Doc #11, Ex 8.

20 On May 6, 2008, petitioner filed a federal petition for
21 writ of habeas corpus under 28 USC Section 2254. Doc #1. On July
22 21, 2008, the court found that the petition stated cognizable claims
23 for relief and ordered respondent to show cause why a writ of habeas
24 corpus should not be granted. Doc #6. Respondent has filed an
25 answer and petitioner has filed a traverse. Doc ## 10, 13.

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II

The California court of appeal summarized the factual background of the case as follows:

A. The People's Case in Chief.

Jackson was 33 years old when he died on December 4, 2002. Before his death, Jackson had been in a homosexual relationship with Derrick Miller, who was 35 years old at the time of trial in 2005.

In early December 2002, Jackson and Miller had from time-to-time been living together in the back bedroom of Berna Blake's apartment. Her apartment was on the third and top floor of an apartment building in Oakland located on the corner of 25th and Telegraph Avenues. Berna Blake had known Jackson for about three years.

Another homosexual man, Parish Blake, was also staying at Berna Blake's apartment in December 2002. Parish Blake had often seen defendant hanging out near Berna Blake's apartment. He knew defendant by sight, and he also knew defendant's voice. He testified that defendant had harassed him because of his sexual orientation, which on one occasion prompted him to tussle with defendant. Parish had also seen defendant and five other people jump Jackson about five days before Jackson's death. Defendant hit and stomped on Jackson. The attack lasted four or five minutes.

Miller testified that he had seen defendant near Berna Blake's apartment nearly every day. He, too, knew defendant's voice. Defendant and his frequent companion, Donte Lewis, often verbally harassed Miller and Jackson about their homosexuality. For example, about two or three weeks before Jackson's death, Miller saw defendant and Lewis come toward Jackson after he had left Berna Blake's apartment. Miller ran over to Jackson and urged him to continue on his way, but defendant and Lewis started to mock Miller, repeating whatever he said to Jackson. One of them asked Jackson, "Is that your bitch?" Miller testified that he feared for Jackson's safety because of the repeated altercations Jackson had with defendant and Lewis. Miller thought defendant and Lewis sometimes waited for Jackson to come out of the apartment just to

1 antagonize Jackson. Miller testified he had
2 once seen defendant with a gun in his waistband.
3 Another time he saw defendant running down the
4 street with a gun in his hand.

5 Berna Blake often saw defendant near her
6 apartment, at times daily. A couple of weeks
7 before Jackson's death, Jackson had been upset
8 and was crying after a conversation with
9 defendant. Jackson told Berna Blake that he was
10 tired of going out because every time Jackson
11 went out, defendant and Lewis had something to
12 say to him.

13 Three times during the year before Jackson's
14 death, Berna Blake had seen defendant with a
15 small gun. In one incident, she saw defendant
16 pull a gun on someone behind her apartment
17 building; in another, she saw defendant shooting
18 at someone he did not want in the area.

19 At about 6:00 pm on December 4, 2002, Miller
20 returned home from his job as a landscape
21 gardener. He was wearing the kneepads that he
22 wore for his work. Defendant was standing by
23 the front door of the apartment building with at
24 least five other people. As Miller passed
25 defendant, defendant called out, in a sarcastic
26 tone, "Look at that nigga. He got on kneepads."
27 Miller sarcastically replied, "It's called a
28 job, something you know nothing about."
Defendant's response was, "What you say? I'll
beat your ass." Miller laughed and kept walking
to Berna Blake's apartment because he did not
think defendant could "whoop" him.

Defendant, a female friend of his, and another
man followed Miller up to Berna Blake's
apartment. Berna Blake stopped them at the door
and told them to leave. Defendant told her that
Miller was not going to disrespect him.
Defendant tried to push past Berna Blake and
reach into the apartment to hit Miller, but she
blocked him with a bar. At this point, Jackson
started saying to Berna Blake that she should
let defendant and Miller fight. Miller started
swinging toward defendant, and Berna moved out
of the way because she "was in the middle of the
swinging * * * [and she] didn't want to get
hit." Miller started fighting with defendant in
the hallway.

No weapons were used during the fight. While
Jackson, Berna Blake, and at least two other
people looked on, Miller grabbed defendant's

1 dreadlocks and banged his head against the
2 floor, getting the best of defendant. Defendant
3 could not fight back because, according to
4 Miller, "he was whooped." Miller got up off of
5 him. Jackson said, "That's enough," and told
6 Miller to go inside Berna Blake's apartment to
7 wash the blood off his hands. Defendant got up,
8 holding his head. Defendant wanted to keep
9 fighting, but Jackson told Miller, "No, go in
10 there and wash your hands. You already whooped
11 him. You have nothing to prove to nobody."
12 Defendant and the others left.

13 After the fight, Miller's hand was bleeding, so
14 he went into the bathroom with Jackson to wash
15 off the blood. Berna Blake went to a nearby
16 store to get some bandages for Miller's hand.
17 Before she left, she told Miller and Jackson not
18 to let anyone into the apartment.

19 Lewis, a friend of defendant's, testified that
20 he saw defendant leave the apartment building
21 after his fight with Miller. Oakland Police
22 Sergeant Mark Dunakin later testified that when
23 he interviewed Lewis, Lewis said that defendant
24 had told Lewis that "the faggot dude grabbed my
25 hair, dragged me, and had me on the ground."
26 Lewis could not recall telling this to the
27 police.

28 After defendant left the apartment building,
Lewis saw him go toward a nearby red building
and return holding a small pistol. Lewis had
seen defendant with a gun once before. Lewis
later saw defendant go back into the apartment
building with a "chrome .25" in his hand. After
Lewis heard gunshots, he saw defendant come out
of the apartment building. Lewis denied being
present when these gunshots were fired.

Miller testified that five or ten minutes after
Berna Blake had left the apartment to buy
bandages, he heard a knock at the door. Jackson
went to answer the door and Miller heard him
start talking to defendant. Miller was still in
the bathroom at the time, washing the blood off
his hands. Parish Blake, who was in the
kitchen, also heard Jackson talking to
defendant. Defendant calmed himself down, asked
to talk to Miller, and told Jackson that he
(defendant) was "not going to fight" Miller.
But Jackson refused to let defendant inside the
apartment. While talking to defendant,
Jackson's tone of voice was "arrogant and
gloating," and he spoke in a feminine voice.

1 Miller heard Jackson tell defendant that Miller
2 was in the bathroom. Defendant told Jackson to
3 tell Miller that Miller was "a mark" and that
4 defendant was going to "get him." Then Miller
5 heard Lewis say to defendant, "No, Rob."
6 Defendant responded, "I'm not going to do
7 nothing. Dre [Jackson] is my partner." Miller
8 next heard "scuffling" sounds. Parish Blake, by
9 then in the bedroom, heard the front door bang
10 open. Miller and Parish Blake then heard at
11 least four gunshots in rapid succession and
12 running footsteps.

13 Parish Blake saw Jackson run down the
14 apartment's hallway as the shots were fired. He
15 went to the door and saw defendant holding a
16 gun, which defendant then lowered to his side.
17 Parish Blake then heard Lewis say, "Come on,
18 let's go." He saw defendant and Lewis go down
19 the stairs. Parish Blake did not see a gun in
20 Lewis's hand.

21 Meanwhile, Miller had opened the bathroom door
22 to see Jackson running down the interior
23 hallway. Jackson fell to the floor, face up.
24 Jackson was gasping and trying to breathe.
25 Miller called 911 and reported that defendant
26 had shot Jackson. Parish Blake also called 911,
27 but he refused to tell the 911 operator who had
28 shot Jackson for fear of being known as a
snitch.

About ten minutes after Berna Blake had left her
apartment to go to the store, she saw defendant
and Lewis get into a car driven by someone Berna
Blake knew as Latoya. They seemed to be in a
hurry.

* * *

B. The Defense Case in Chief.

* * *

Defendant then testified on his own behalf. He
said that shortly after 5:00 pm on December 4,
2002, he went to Oakland to visit a former
foster parent. There, near the scene of the
shooting, he saw Lewis arguing with Miller, whom
defendant said he did not know at the time.
Miller was accusing Lewis of having been
involved in robbing Miller's friend. As they
argued, defendant stepped between Miller and
Lewis and pushed them back to separate them.
Miller grabbed defendant, and defendant grabbed

1 back. They both fell to the ground. Then a man
2 and a woman came and separated Miller and
3 defendant. Miller said something, and Lewis
4 said, "All right, I'm going to get Q."
5 Defendant harbored no ill feelings toward Miller
6 because it was defendant's own fault for having
7 interfered in something that was not his
8 business. Defendant continued on his way to his
9 former foster parent's home.

10 On December 23, 2002, after returning to Oakland
11 to visit his former foster parent, defendant was
12 arrested. Defendant also saw the police bring
13 Lewis out of the building and put him in a car.

14 After the police put him in an interrogation
15 room, defendant agreed to talk to the
16 investigating officers. They told defendant
17 that a number of people had implicated him in a
18 shooting and asked whether he knew Lewis. They
19 played a tape recording in which Lewis said that
20 he saw defendant go to a red building and come
21 back with a chrome .25 pistol. They told
22 defendant they had taped statements and photo
23 lineups from several people who had accused
24 defendant, including Miller and Parish Blake.
25 They also told defendant that if they took the
26 tapes to the district attorney, defendant would
27 go to prison and would not be eligible for
28 parole until he was 60. They told defendant
that in prison, larger, stronger prisoners would
assault and rape him. However, they said they
had helped someone from his old neighborhood,
Spud, get his murder charges dropped and said
they could help defendant too.

19 Defendant testified the investigating officers
20 suggested to him a scenario where Lewis fired
21 the shots and then turned the gun on defendant
22 because defendant was a witness. According to
23 their scenario, Lewis then dropped the gun,
24 defendant recovered it, and by doing so,
25 defendant prevented Lewis from taking another
26 innocent life. They also suggested that when
27 defendant picked up the gun, it accidentally
28 went off a few times, "justify[ing] the shots,"
and then Lewis wrestled the gun away from
defendant and ran away. If defendant would
adopt this scenario, they said, they could get
defendant's case dropped. Otherwise, they would
take the tapes they had obtained to the district
attorney. They left defendant alone to think
about their proposal.

1 According to defendant, [Oakland Police Sergeant
2 Derwin] Longmire returned to the interrogation
3 room a few minutes later, put on a pair of
4 gloves, and asked, "So, you don't know. You
5 still don't know nothing, huh?" Defendant shook
6 his head no. Longmire said, "You think you['re]
7 cool, huh?" Longmire then punched defendant in
8 the head and he fell to the floor. Everything
9 went blank. When defendant woke up, Longmire
10 said, "That should refresh your memory."

11 Seconds later, Dunakin came into the room to ask
12 if defendant was alright. Defendant said he
13 needed some ice because he had been hit in the
14 head. Dunakin said he would get some.
15 Defendant said he then started bleeding so
16 profusely that he began to get dizzy, to panic,
17 and finally to black out. Defendant testified
18 that he did not remember any suicide attempt.
19 After awhile, paramedics arrived and took him to
20 a hospital.

21 When defendant was brought back to the Oakland
22 Police Department, the investigating officers
23 allowed defendant to see his girlfriend Keisha,
24 but they would not allow him to talk to her
25 until he gave them the statement they wanted.
26 They told him that he could walk out with his
27 girlfriend right then if he would place Lewis at
28 the scene of the shooting, and they again went
over the story they wanted defendant to parrot.
Defendant gave another taped statement, but
Longmire and Dunakin said it was not enough They
told defendant, "Give us Tay." Defendant
started to cry. The officers told him his
girlfriend was waiting outside, and took him to
where he could see her, but not speak to her.
Finally, when asked whether he was ready to go
home, defendant said yes. Defendant then gave a
taped statement consistent with what the
officers had suggested.

Defendant testified he did not shoot Jackson and
denied ever even holding a firearm of any kind.
He denied knowing Miller, Parish Blake, or Berna
Blake at all. He said the first time he met
Miller was when he tried to break up the
altercation between Miller and Lewis on the
street. He also denied meeting Jackson before
the day of the shooting and denied being on the
third floor of Berna Blake's apartment building
when the shooting occurred.

1 C. The People's Case in Rebuttal.

2 On rebuttal, Sergeant Longmire denied ever
3 punching defendant and Sergeant Dunakin denied
4 ever seeing Longmire strike defendant. Dunakin
5 also denied ever telling defendant that he was
6 looking at many years in prison and denied ever
7 asking defendant about the prospect of being
8 raped in prison. Dunakin denied ever urging
9 defendant to incriminate Lewis, explaining he
10 had already obtained a warrant for defendant's
11 arrest whereas he considered Lewis only to be a
12 witness in the case.

13 Doc #11, Ex 6 at 2-6, 10-13 (footnotes omitted).

14 III

15 A federal court may not grant a writ of habeas corpus on
16 any claim adjudicated on the merits in state court unless the
17 adjudication: "(1) resulted in a decision that was contrary to, or
18 involved an unreasonable application of, clearly established Federal
19 law, as determined by the Supreme Court of the United States; or (2)
20 resulted in a decision that was based on an unreasonable
21 determination of the facts in light of the evidence presented in the
22 State court proceeding." 28 USC § 2254(d).

23 "Contrary to" requires a finding that the state court's
24 conclusion of law is opposite Supreme Court precedent or the state
25 court's decision differs from Supreme Court precedent on a set of
26 materially indistinguishable facts. See Williams v Taylor, 529 US
27 362, 412-13 (2000). A state court "unreasonably appli[es]" federal
28 law if it identifies the correct governing legal principle from
Supreme Court precedent, "but unreasonably applies that principle to
the facts of the prisoner's case." *Id* at 413. A federal habeas
court making the "unreasonable application" inquiry should ask

1 whether the state court's application of clearly established federal
2 law was "objectively unreasonable." Id at 409.

3 The only definitive source of clearly established federal
4 law under 28 USC Section 2254(d) is in the holdings, as opposed to
5 the dicta, of the Supreme Court as of the time of the state court
6 decision. Williams, 529 US at 412; Clark v Murphy, 331 F3d 1062,
7 1069 (9th Cir 2003), cert denied, 540 US 968 (2003). While circuit
8 law may be "persuasive authority" for purposes of determining
9 whether a state court decision is an unreasonable application of
10 Supreme Court precedent, only the Supreme Court's holdings are
11 binding on the state courts and only those holdings need be
12 "reasonably" applied. Clark, 331 F3d at 1069.

13
14 IV

15 Petitioner seeks habeas relief under 28 USC Section 2254
16 based on three claims: (1) he was denied his rights to due process,
17 to remain silent and to counsel by the admission into evidence of
18 his pretrial statements; (2) he was denied due process and his right
19 to a jury trial by the testimony of a bailiff; (3) his conviction
20 for first degree murder is not supported by sufficient evidence.

21
22 A

23 Petitioner claims that the trial court erred by admitting
24 his pretrial statements because those statements were coerced and
25 procured after an involuntary waiver of his rights under Miranda v
26 Arizona, 384 US 436 (1966).

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1

2 The California court of appeal provided the following
3 background for this particular claim:

4 On August 9, 2005, defendant filed a motion in
5 limine seeking to exclude his pretrial
6 statements to the police on Miranda and
7 involuntariness grounds. A hearing on the
8 motion was held on August 17 and 18, 2005,
9 during which the court received the following
10 testimony and evidence: On December 23, 2002,
11 defendant was arrested and questioned regarding
12 Jackson's death; defendant was 20 years old at
13 the time. Before this arrest, he had been
14 arrested three to five times for drug offenses,
15 including as a juvenile. When defendant was
16 arrested on October 1, 2001 for possession of
17 narcotics for sale, he was advised of his
18 Miranda rights, said he understood those rights,
19 and after initially stating he would speak with
20 the interviewing officer, invoked his right to
21 silence.

22 * * *

23 The first portion of defendant's interview with
24 police lasted from 4:03 pm to 5:45 pm. At 4:03
25 pm, investigating officers Dunakin and Longmire
26 introduced themselves to defendant and began to
27 fill out the biographical portion of their
28 standard statement form with defendant's
assistance. During the interview, defendant was
not handcuffed. Neither Dunakin nor Longmire
had his gun with him, and they were both dressed
in plain clothes. They were the only officers
in the interview room. Dunakin told defendant
that he wanted to discuss a murder that had
occurred in early December. At this point in
the interview, Dunakin read defendant the
Miranda advisements printed on the statement
form. After Dunakin asked defendant if he
understood his Miranda rights, defendant
answered, "Yes." Dunakin then asked if, having
these rights in mind, defendant would like to
talk to the investigating officers, and
defendant responded, "Yes. No problem."
Dunakin recorded defendant's responses on the
form and defendant initialed his responses.

29 * * *

30 The initial portion of the interview was not
taped. During this portion, defendant said that

1 on the date of Jackson's death, he was in San
2 Francisco with his girlfriend, Keisha. He said
3 he had never been to the area of Berna Blake's
4 apartment. He said he had seen Donte Lewis
5 around, but did not know Miller, Parish Blake or
6 Berna Blake. Defendant denied having gotten
7 into a fight with anyone on December 4, 2002, or
8 at any other time that month.

9 Dunakin then told defendant he had tapes from
10 witnesses who said defendant had been to the
11 area of Berna Blake's apartment and that
12 defendant had been involved in a homicide there.
13 Defendant did not change his story and continued
14 to deny any involvement. Dunakin brought Lewis
15 to the door of the interview room so defendant
16 could see him, but defendant continued to deny
17 knowing Lewis. At 5:45 pm, the investigating
18 officers left the interview room, allowing
19 defendant to remain unhandcuffed. By that
20 time, defendant had become "jittery" and
21 nervous; he was pacing back and forth when the
22 officers left the room. Dunakin testified that
23 the more they confronted defendant with
24 information regarding the case, the more nervous
25 defendant became. However, when Dunakin left
26 the room, he had no concern about defendant's
27 safety or well-being.

28 At about 6:05 pm, the officers heard a thump, as
if someone had fallen. They entered the
interview room to check on defendant and found
him on his back. Defendant stood up on his own,
said he was fine, but said he had lost his
balance and had fallen. Longmire told defendant
to sit in the chair and relax. Defendant looked
nervous, but physically fine. He was seated and
not handcuffed when the officers again left the
room.

Through the interview room door, defendant then
asked Dunakin for some water and some ice for
his head. As Dunakin was getting these for
defendant, he heard some banging and what
sounded like chairs being moved around.
Dunakin looked through the peephole in the
interview room's door to see defendant walking
in circles very quickly. He seemed "really
excited" like he was "starting to freak out."
Looking through the peephole again, Dunakin saw
something around defendant's neck. Dunakin then
pushed the door open and saw there was a
shoelace around defendant's neck, the other end
of which was tied to the doorknob. The lace
came from one of defendant's shoes. Dunakin

1 took the shoelace off the doorknob, and Longmire
2 untied the lace from around defendant's neck.
3 Longmire tried to calm defendant, saying,
4 "Breathe. This isn't the way to handle this."

5 Dunakin called for an ambulance. * * * The
6 ambulance arrived quickly and transported
7 defendant to Highland Hospital.

8 * * *

9 After defendant was cleared at Highland
10 Hospital, he was transported very early on
11 December 24, 2002 to John George Psychiatric
12 Pavilion where he spoke with medical staff for
13 about a half hour. He was then cleared
14 medically, which typically involved the
15 transporting police officer receiving paperwork
16 stating the inmate was "fit for incarceration."
17 Defendant was transported to the police
18 department and placed in the same interview room
19 at 5:30 am. The door to the interview room was
20 left open. One of the transporting officers
21 testified he did not observe anything unusual
22 about defendant's demeanor at that point. He
23 did not complain of any physical discomfort, nor
24 display any abnormal behavior. Longmire arrived
25 and checked on defendant's well-being at
26 6:12 am.

27 At 6:59 am, Dunakin and Longmire returned to the
28 interview room. Dunakin readvised defendant of
29 his Miranda rights, verbatim, asked him if he
30 understood the rights, and asked if, having his
31 rights in mind, defendant wished to talk to him.
32 Defendant said, "Yes," and initialed a written
33 waiver form. Defendant then explained that the
34 reasons for his apparent suicide attempt were
35 that he was upset because nobody had come for
36 his birthday, he felt lonely, and his life was a
37 mess. He again denied killing Jackson. After
38 the officers had been talking to defendant about
39 the importance of telling them the truth,
40 defendant started to become sad and emotional,
41 though still calm. He said "he was sorry for
42 what happened. He didn't mean for it to
43 happen." But then he "pulled back again,"
44 denying any involvement in Jackson's death.
45 During this second segment of the interview,
46 defendant did not complain of any physical
47 discomfort, nor exhibit any behavior that gave
48 Dunakin any concern about defendant's
49 psychiatric well-being. He also never indicated
50 to the officers that he wanted to terminate the
51 interview or that he wanted to invoke his

1 Miranda rights to stop talking with the
2 officers.

3 At one point during this second portion of the
4 interview, defendant asked to talk with his
5 girlfriend, Keisha. Dunakin telephoned Keisha
6 and asked her to come to the police station. At
7 8:30 am, defendant saw Keisha during a bathroom
8 break, but the officers did not allow defendant
9 to talk to Keisha at that time. They resumed
10 the interview at 8:35 am.

11 At another point in the interview, defendant
12 indicated that the "[w]ord on the block" was
13 that Donte Lewis was at the scene of the crime.
14 The officers began asking questions about
15 Lewis's possible involvement. Defendant's
16 answers were responsive and coherent. He did
17 not appear to have any difficulty understanding
18 the questions.

19 At 9:25 am on December 24, 2002, defendant said
20 in a taped statement that his Miranda rights had
21 been read to him both on the previous night,
22 December 23, as well as on the morning of
23 December 24. He said he had acknowledged those
24 rights and had indicated a willingness to talk
25 to the officers. Defendant then described how
26 he had been feeling alone before he put the
27 shoestring around his neck. When asked whether
28 he had tried to kill himself on his own, he
29 responded that he just "wanted to escape," and
30 that "life is so hard." He said he did not know
31 how he got the cut above his eye, but he said it
32 probably happened when he fell to the floor.

33 Defendant acknowledged that he had been near the
34 area of Berna Blake's apartment. He said he had
35 told the officers earlier that he was sorry for
36 the shooting, but said he thought it was an
37 accident. He said that he had heard that Lewis
38 had gotten into an altercation, went to get
39 "some protection," then came back and shot
40 someone. Defendant said he had been in San
41 Francisco with Keisha on the day of the
42 shooting. Defendant again denied knowing
43 Jackson, Parish Blake, or Berna Blake, as well
44 as ever having been on the third floor of the
45 apartment building where Jackson was shot. The
46 taped interview concluded at 9:46 am, when the
47 officers took a break, leaving defendant
48 unhandcuffed in the interview room.

49 From 9:57 am to 11:24 am, the officers checked
50 on defendant periodically, at times finding him

1 asleep, and at other times giving him food. At
2 11:25, the officers resumed the interview, but
3 did not tape it. During this portion of the
4 interview, defendant started talking about what
5 he had heard, about specifics involving Lewis,
6 and about a fight Lewis was in which defendant
7 had observed.

8 From 12:16 pm to 12:26 pm, the officers
9 conducted a second taped interview. On this
10 tape, defendant again confirmed that, on both
11 December 23 and 24, Dunakin had read defendant
12 his Miranda rights, and defendant had
13 acknowledged those rights and agreed to speak
14 with the investigating officers. Defendant then
15 described a fight between Lewis and someone
16 outside of the apartment building where Jackson
17 was shot. Defendant said he verbally tried to
18 break this fight up by trying to help them come
19 to a compromise. He said the man Lewis fought
20 with talked as though he were homosexual. He
21 said he saw Lewis go get a gun afterwards.
22 Lewis and defendant then went to the top of a
23 building where Lewis knocked on a door. Lewis
24 invited the person who answered the door and
25 that person's friend to come outside. Lewis
26 wanted to fight the friend and wanted defendant
27 to fight the other person. However, defendant
28 next heard Lewis fire a shot and defendant
turned and ran out of the building

After this second taped interview, the officers
started to leave the interview room to take a
break, but defendant grabbed Dunakin's leg and
asked him not to leave. Defendant said "I
didn't mean to do it. It just started going
off. Can't remember what kind it was." He
started sobbing and said something to the effect
of, "Accidentally happened. Shot four times."

The officers then made a third, and final, tape
from 12:39 pm to 12:50 pm. Again, defendant
acknowledged having had his Miranda rights read
to him on December 23 and 24, having
acknowledged those rights, and having agreed to
talk to the officers. Longmire asked defendant
to pick up with the "true version" of what
happened when defendant and Lewis were on the
third floor of the apartment building.
Defendant said Lewis was trying to get someone
to come out of the apartment, but that person
refused. Defendant "heard a pop." He and Lewis
ran toward each other, and Lewis dropped
something. Defendant picked it up. It was a
gun. Defendant did not aim the gun, but tried

1 to avoid shooting himself while he ran.
2 Defendant and Lewis were still near the doorway
3 of the apartment where the person had been shot.
4 Defendant said the gun "just kept bouncing" in
5 his hand and went off about four times, though
6 he could not be sure of the exact number because
7 it all "happened so fast." Defendant did not
8 see the man who was shot. After the shots,
9 defendant gave the gun to Lewis and then left.

10 Defendant told the officers he at first claimed
11 not to have any first-hand knowledge of
12 Jackson's shooting because he "didn't know [the
13 officers] had good intentions." Defendant
14 explained it was "difficult" for him to talk
15 about the shooting because "look what happened.
16 [¶] * * * Someone died for nothing."

17 Defendant agreed on the tape that during their
18 interviews the officers had not been abusive,
19 and specifically that they did not hit him or
20 "throw [him] down." Defendant explained the
21 reason he had tried to hang himself the night
22 before was he "was thinking, 'man, [I] can't say
23 good-bye to my mother, my girl or * * * I never
24 see nobody again. I'll just never get to * * *
25 say, 'I'm sorry.''"

26 From 1:58 pm to 2:20 pm, the officers allowed
27 defendant's girlfriend Keisha to visit with
28 defendant in the interview room. Defendant was
then taken to jail. Dunakin testified during
the hearing that he did not make any promises to
the defendant during the interviews "about being
able to see Keisha, if he, for example,
cooperated with [the officers], or gave [them] a
true version of what happened." Dunakin agreed
that defendant brought up his desire to talk
with Keisha several times during the interviews.
Each time, his response was something to the
effect of, "We will try to make those
accommodations later." Dunakin said the
officers "told him that we would allow him to
speak with Keisha if the opportunity presented
itself afterwards or when it was appropriate.
But there was no promise that he was going to
speak to her." The officers ultimately allowed
defendant to speak with Keisha because "it was
Christmas Eve, and we were done speaking with"
defendant.

Dunakin also testified that throughout the
investigating officers' interviews of defendant,
he appeared to understand their questions and
his answers were responsive and coherent.

1 Defendant never showed any unwillingness to
2 speak to them. Dunakin testified neither he nor
3 Longmire ever used any physical force on
4 defendant, nor did they make any threats toward
5 defendant or anyone else. They made no threats
6 regarding penalty, punishment, or the district
7 attorney's involvement in the case, and no
8 promises of leniency. Dunakin testified he
9 never raised his voice or yelled at defendant.

10 Doc #11, Ex 6 at 24-26, 27-31.

11 The California court of appeal found no error in the trial
12 court's admission of petitioner's pretrial statements. The court
13 found petitioner knowingly and intelligently waived his Miranda
14 rights despite his suicide attempt or any mental illness. Doc #11,
15 Ex 6 at 33-36. The court found the suicide attempt could not be
16 asserted as an invocation of petitioner's right to silence as a
17 suspect must unambiguously assert his right to silence once that
18 right has been waived. Id at 34. Finally, the court dismissed
19 petitioner's claim of police coercion because the promise, if one
20 existed, did not proximately cause petitioner's pretrial statements.
21 Id at 36-37, (quoting People v Benson, 52 Cal3d 754, 778 (1990)).

22 2

23 Involuntary confessions are inadmissible under the
24 Fourteenth Amendment. Blackburn v Alabama, 361 US 199, 206-07
25 (1960). "The test is whether, considering the totality of the
26 circumstances, the government obtained the statement by physical or
27 psychological coercion or by improper inducement so that the
28 suspect's will was overborne." United States v Leon Guerrero, 847
F2d 1363, 1366 (9th Cir 1988) (citing Haynes v Washington, 373 US
503, 513-14 (1963)).

1 To obtain federal collateral relief for the erroneous
2 admission of an involuntary confession, petitioner also must show
3 that the error was not harmless. Fulminante v Arizona, 499 US 279,
4 306-12 (1991). In other words, habeas relief is appropriate only if
5 the coerced confession had a "substantial and injurious effect or
6 influence in determining the jury's verdict." Pope v Zenon, 69 F3d
7 1018, 1025 (9th Cir 1995) (quoting Brecht v Abrahamson, 507 US 619,
8 637 (1993)).

9 Similarly, to obtain federal collateral relief for the
10 erroneous admission of statements obtained in violation of Miranda,
11 petitioner must show that the error in admitting the statements was
12 not harmless. Jackson v Giurbino, 364 F3d 1002, 1010 (9th Cir 2004)
13 (quoting Calderon v Coleman, 525 US 141, 147 (1998)).

3

16 For the purposes of this petition, the court assumes,
17 without deciding, that constitutional error occurred when the trial
18 court admitted petitioner's pretrial statements. The court finds,
19 however, that any such error could not have had a substantial and
20 injurious effect or influence in determining the jury's verdict that
21 petitioner was guilty of first degree murder. Thus, petitioner's
22 claim for collateral relief on the grounds that admission of his
23 pretrial statements violated his rights to due process, to remain
24 silent and to counsel, fails.

25 Petitioner does not identify which of his trial statements
26 were erroneously admitted as well as how their admission had a
27 substantial and injurious effect or influence in determining the
28 jury's verdict. Nonetheless, the court examines the possible effect

1 or influence petitioner's pretrial statements could have had on the
2 jury's verdict.

3 The jury was instructed with California Criminal Jury
4 Instruction Number 8.20 as follows: "All murder which is
5 perpetrated by any kind of willful, deliberate and premeditated
6 killing with express malice aforethought is murder in the first
7 degree * * * ." Doc #11, Ex 1, Vol 2 at 323. Because the jury
8 instructions are not challenged by petitioner, the court examines
9 the "effect or influence" each of petitioner's statements could have
10 had on the jury's first degree murder verdict.

11 The portion of petitioner's interview that occurred from
12 4:03 pm to 5:45 pm on December 23rd, 2002 consisted of: (i) a
13 potential alibi for the day of the shooting; (ii) a denial of ever
14 being near Berna Blake's apartment; (iii) a denial of knowing Lewis,
15 Miller, Parish Blake or Berna Blake; and (iv) a denial of having
16 engaged another man in a fight on December 4, 2002. Doc #11, Ex 6
17 at 25.

18 None of the statements in this portion of the interview
19 could have contributed to the jury's verdict of first degree murder;
20 they neither prove petitioner perpetrated the crime nor do they
21 prove "any kind of willful, deliberate and premeditated killing with
22 express malice aforethought." CALJIC No 8.20. Because these
23 statements are not probative of the elements of the crime, they
24 could not have had a substantial and injurious effect or influence
25 on the jury's verdict.

26 The portion of petitioner's interview that started at
27 6:59 am on December 24 followed petitioner's attempted suicide and
28 subsequent medical clearance. Doc #11, Ex 6 at 26-27. That portion

1 of petitioner's interview consisted of an explanation for his
2 attempted suicide and a denial that he killed Jackson. Id at 27.

3 Petitioner's attempted suicide may be probative of
4 consciousness of guilt. Because a showing of consciousness of guilt
5 is probative of guilt (see, for example, People v Osslo, 50 Cal2d
6 75, 93 (Cal 1958)), petitioner's statement could have had an
7 injurious effect or influence on the jury's verdict under CALJIC No
8 8.20 if it were the only evidence of petitioner's suicide attempt.
9 But, the jury heard evidence of petitioner's suicide attempt through
10 the eyewitness testimony of the interrogating officers. See Doc
11 #11, Ex 2, Vol 5 at 985-94 & Vol 6 at 1243-47. In this regard,
12 petitioner's statements regarding his suicide attempt were
13 cumulative and, thus, could not have had a substantial effect or
14 influence on the jury's verdict. Further, to the extent
15 petitioner's statements included an explanation for his suicide
16 attempt, they could not have had an injurious effect or influence on
17 the jury's verdict because they offered a frame-of-mind other than
18 consciousness of guilt.

19 The portion of petitioner's interview that started at
20 8:35 am consisted of a hearsay statement accusing Lewis of Jackson's
21 murder. Doc #11, Ex 6 at 28. This statement could not have had an
22 injurious effect or influence on the jury's decision to convict
23 petitioner of first degree murder because it provided an alternative
24 perpetrator for Jackson's murder. The statement did not provide any
25 basis for the jury to find petitioner guilty of first degree murder
26 as instructed under California Criminal Jury Instruction No 8.20.

27 The portion of petitioner's interview that started at
28 9:25 am consisted of: (i) another explanation for his suicide

1 attempt; (ii) acknowledgment that he had been near Berna Blake's
2 apartment; (iii) a reaffirmation of his alibi; (iv) a further denial
3 of knowing Jackson, Parish Blake or Berna Blake; (v) a repeat of the
4 hearsay statement accusing Lewis of the murder; and (vi) another
5 hearsay statement that the shooting was an accident. Doc #11, Ex 6
6 at 28-29.

7 None of these statements could have contributed to the
8 jury's verdict of first degree murder. As noted earlier, the
9 explanation for petitioner's suicide attempt is cumulative to the
10 officers' eyewitness testimony. See Doc #11, Ex 2, Vol 5 at 985-94
11 & Vol 6 at 1243-47. Also, statements regarding petitioner's alibi,
12 his denial of knowing Jackson, Parish Blake or Berna Blake and the
13 hearsay statements could not have had an injurious effect or
14 influence on the jury's verdict because they neither incriminated
15 petitioner as the perpetrator of the crime nor provided evidence of
16 premeditation. See CALJIC No 8.20. Further, petitioner's statement
17 that he had been in or around Berna Blake's apartment was provided
18 by the eyewitness testimony of Parish Blake, Berna Blake and Miller.
19 See, for example, Doc #11, Ex 2, Vol 3 at 502-04 [testimony of
20 Parish Blake] & Vol 4 at 862-67 [testimony of Berna Blake]. Thus,
21 this statement also was cumulative, and as such, could not have had
22 a substantial effect or influence on the jury's verdict.

23 The portion of petitioner's interview that started at
24 12:16 pm consisted of a story that begins with Lewis fighting
25 another male outside the apartment building where Jackson was shot.
26 Doc #11, Ex 6 at 29. Petitioner stated that he had attempted to
27 stop the fight by seeking a compromise between the men. Petitioner
28 clarified that Lewis's opponent "talked as though he were

1 homosexual." Petitioner stated that Lewis retrieved a gun and then
2 petitioner accompanied Lewis to an apartment. Petitioner stated
3 that Lewis invited the person who answered the door and his friend
4 to come outside. Petitioner stated that Lewis intended for
5 petitioner to fight the person who answered the door, while Lewis
6 would fight the friend. Petitioner stated that he heard Lewis fire
7 a shot and then petitioner ran out of the building. Id.

8 The first segment of petitioner's statement here,
9 involving petitioner seeking a compromise for a fight between Lewis
10 and a homosexual male, was consistent with petitioner's own
11 testimony. Doc #11, Ex 6 at 10-11. Because petitioner testified at
12 trial to the same facts in this segment of his pretrial statement,
13 the admission of that segment could not have had a substantial and
14 injurious effect or influence on the jury's verdict.

15 The second segment, involving Lewis retrieving a gun and
16 then petitioner accompanying Lewis to an apartment where shots were
17 subsequently fired, could not have had a substantial and injurious
18 effect or influence on the jury's verdict. Evidence placing
19 petitioner and Lewis at the scene of the crime was amply provided by
20 eyewitness testimony from Miller and Parish Blake. Doc #11, Ex 6 at
21 5-6. In addition, Berna Blake testified that she witnessed
22 petitioner and Lewis hastily leaving the area of the apartment
23 building shortly after Jackson's shooting. Id at 6. This segment
24 of petitioner's pretrial statements is also cumulative and, thus,
25 could not have had a substantial effect or influence on the jury's
26 verdict. Moreover, petitioner's statements not only provided an
27 explanation for the eyewitness testimony that placed him at the
28 scene of the crime but also, if believed, exonerated him because it

1 identified Lewis as the perpetrator. As such, it could not have had
2 an injurious effect or influence on the jury's verdict.

3 Following this portion of the interview, petitioner added
4 to the officers that he "didn't mean to do it. It just started
5 going off. [He couldn't] remember what kind it was." Doc #11, Ex 6
6 at 8, 29. Petitioner then started sobbing and said something to the
7 effect of "Accidentally happened. Shot four times." Id. This
8 statement is repeated in the final portion of petitioner's
9 interview, which is analyzed below.

10 The final portion of petitioner's interview started at
11 12:39 am and consisted of another story beginning with Lewis trying
12 to get someone out of an apartment on the building's third floor.
13 Doc #11, Ex 6 at 29-30. Petitioner stated that he heard a "pop" and
14 then Lewis and petitioner ran toward each other. Petitioner stated
15 Lewis dropped something and then petitioner picked it up.
16 Petitioner stated it was a gun and he tried to give the gun back to
17 Lewis. Petitioner stated that he did not aim the gun, but tried to
18 avoid shooting himself while he ran. Petitioner stated the gun
19 "kept bouncing" in his hand and went off about four times, though he
20 could not be sure of the exact number. Petitioner stated that after
21 the shots were fired, he gave the gun back to Lewis. Petitioner
22 stated that he did not see the man who was shot. Petitioner added
23 that he had, at first, claimed not to have any first-hand knowledge
24 of the incident because he "didn't know [the officers] had good
25 intentions." Id at 30.

26 To the extent that this portion of petitioner's statement
27 placed him at the scene of the crime, as noted earlier, eyewitness
28 testimony provided by Miller, Parish Blake and Berna Blake likewise

1 placed petitioner at the scene of the crime. As such, Petitioner's
2 statement could not have had a substantial effect or influence on
3 the jury's verdict. Moreover, this portion of petitioner's pretrial
4 statements explains the incriminating eyewitness testimony of Parish
5 Blake which places petitioner at the scene of the crime with a gun
6 in his hand immediately after the gun shots were fired. Because
7 this portion of petitioner's pretrial statements, if believed by the
8 jury, was exculpatory, it could not have had an injurious effect or
9 influence on the jury's verdict.

10 Taking into account the effect or influence each of
11 petitioner's pretrial statements could have had on the jury's
12 verdict, the court cannot say that, assuming the admission of those
13 statements was error, the error had a substantial and injurious
14 effect or influence on the jury's verdict. Brecht, 507 US at 637.

15
16 B

17 Petitioner claims that he was denied due process or his
18 right to a jury trial because the trial court permitted the bailiff
19 to testify.

20
21 1

22 The California court of appeal provided the following
23 background for petitioner's claim:

24 Near the end of defendant's trial, the court met
25 with defendant and counsel outside the presence
26 of the jury after being informed that the
27 courtroom bailiff had observed suspicious
28 behavior by the defendant while he was being
brought to the courthouse. * * * The trial
court ruled that the bailiff could testify
[regarding defendant's behavior], but would no

1 longer be permitted to act as a bailiff at this
2 trial.

3 [The bailiff, Ed Ortman] testified that he was
4 also assigned to handle transportation of
5 inmates from the jail at Santa Rita to the
6 courthouse in Oakland; that earlier that
7 morning, Ortman had transported a busload of
8 inmates from Santa Rita to the courthouse; and
9 that defendant was one of the inmates on the
10 bus, as was Miller, who had already testified as
11 a prosecution witness in the case. Before the
12 bus left Santa Rita, Ortman saw defendant pass a
13 folded piece of paper to an inmate named
14 English, who was in an adjacent compartment of
15 the bus, and in the same compartment as Miller.
16 After English looked at the paper, he passed it
17 back to defendant.

18 Ortman removed Miller from the bus to assure his
19 safety. As Ortman did so, defendant told
20 English, "That's him." When Ortman arrived at
21 the courthouse, he obtained the paper from
22 defendant and provided it to the trial court.
23 The paper was a copy of a witness list. On the
24 list, an arrow and a word [D_E] were written
25 next to Miller's name.

26 * * *

27 Defendant then testified that he did pass a copy
28 of the witness list in this case to English.
29 But he said he did so only because English had
30 asked what kind of evidence the People had
31 against defendant, and to show English that it
32 was "just a witness case, it's a hearsay thing."
33 He told English that the real perpetrator was
34 Lewis, whose name was highlighted on the list.
35 Defendant said he had drawn arrows on the
36 witness list next to the names of Miller and two
37 other witnesses to indicate to his attorney that
38 they were in custody and should be examined
39 carefully.

40 Doc #11, Ex 6 at 37-38.

41 The California court of appeal found no error in allowing
42 the bailiff to testify. Doc #11, Ex 6 at 38. The court
43 distinguished the two cases relied upon by petitioner, Turner v
44 Louisiana and Gonzales v Beto, on three grounds: (i) the bailiff
45 here was not a "key" or "crucial" prosecution witness; (ii) the

1 bailiff here ceased associating with the jury after offering his
2 testimony; and (iii) there was very little evidence on the record of
3 the extent and intensity of the bailiff's association with the jury.
4 Id at 40, (citing Turner, 379 US 466 (1965); Gonzales, 405 US 1052
5 (1972)).

2

8 Permitting a bailiff to testify as a witness in a criminal
9 trial can violate a defendant's Fourteenth Amendment right to trial
10 by an impartial jury. See Turner, 379 US at 473-74 (applying a
11 presumption of prejudice in a murder trial in which two deputy
12 sheriffs provided critical testimony relating to the defendant's
13 guilt and enjoyed "a continuous and intimate association" with the
14 jury thought the trial); Gonzales, 405 US at 1055 (Stewart, J,
15 concurring) (noting that the Turner presumption is concerned with
16 "crucial witnesses against the defendant who associated with the
17 jurors as their official guardians throughout the trial").

18 Evidence of improper communications between a bailiff and
19 the jury is not necessary to invoke Turner's presumption of
20 prejudice. Turner, 379 US at 473. The presumption of prejudice,
21 however, is premised on a meaningful role for the bailiff's
22 testimony in the case against the defendant. See Id at 473 ("It is
23 to be emphasized that the [bailiff's] testimony * * * was not
24 confined to some uncontroverted or merely formal aspect of the case
25 for the prosecution. On the contrary, the credibility which the
26 jury attached to the testimony of these two key witnesses must
27 inevitably have determined whether [the defendant] was to be sent to
28 his death."); Cooper v Calderon, 255 F3d 1104, 1113 (9th Cir 2001).

Because the California court of appeal has correctly identified the governing legal principle, the court can only grant collateral relief under this claim if the state court unreasonably applied the principle to the facts of petitioner's case. Williams, 529 US at 413.

Petitioner relies upon Turner and Gonzales for the proposition that the bailiff's testimony was prejudicial. In those cases, the credibility of each bailiff was crucial to the case against the defendant. Turner, 379 US at 473 ("[T]he credibility which the jury attached to the testimony of these two key witnesses must inevitably have determined whether [the defendant] was to be sent to his death.');

Gonzales, 405 US 1053 (Stewart, J, concurring) ("[T]he case * * * turned so largely on [the jury's] assessment of the [bailiff's] credibility.") See also Cooper, 255 F3d at 1113. In both Turner and Gonzales, the defendant challenged the credibility of the bailiff's testimony. Turner, 379 US at 473; Gonzales, 405 US 1053 n 1 (Stewart, J, concurring).

Here, petitioner does not challenge the credibility of the bailiff's testimony. Nor could he without calling into question his own credibility, because petitioner's testimony of the bus incident was consistent with that of the bailiff. Doc #11, Ex 6 at 37-38. Not only did petitioner fail to present the jury with a reason to doubt the credibility of the bailiff's testimony, petitioner removed the question of the bailiff's credibility by providing corroborating testimony. The bailiff's credibility, therefore, played no role in the prosecution's case against petitioner.

Because the credibility of the bailiff did not play a crucial role in petitioner's trial, Turner's presumption of prejudice does not apply to the bailiff's testimony here. Accordingly, the court finds that the California court of appeal's application of Turner and Gonzales to the facts of petitioner's case was not unreasonable. Williams, 529 US at 413.

C

Petitioner claims that his conviction for first degree murder is not supported by sufficient evidence. In particular, petitioner offers the following two-part argument: (i) evidence of premeditation toward a third party, Miller, is not admissible to show premeditation and deliberation on the actual victim, Jackson; and (ii) when the evidence of premeditation toward Miller is removed from the analysis, the evidence to show premeditation and deliberation with respect to Jackson is insufficient.

1

The California court of appeal rejected the first part of petitioner's argument, i e, that evidence of petitioner's premeditation toward Miller was inadmissible as evidence of premeditation and deliberation toward Jackson. The court explained that "[i]t was not improper for the prosecutor to ask the jury to consider the evidence regarding defendant's apparent preparations to shoot Miller. * * * [Petitioner's] 'killing state of mind' before he confronted Jackson at the apartment's door was 'a background fact to be considered as to whether or not premeditation [or deliberation] as to the actual victim took place.'" Doc #11, Ex 6

1 at 19-20, (quoting trial transcript) (last alteration in original).
2 The court also rejected the second part of petitioner's argument,
3 i e, that there was insufficient evidence to show premeditation and
4 deliberation with respect to Jackson. Id at 21-24.

2

5
6
7 A state court's evidentiary ruling is not subject to
8 federal habeas review unless the ruling violates federal law, either
9 by infringing upon a specific federal constitutional or statutory
10 provision or by depriving the defendant of the fundamentally fair
11 trial guaranteed by due process. See Pulley v Harris, 465 US 37, 41
12 (1984); Jammal v Van de Kamp, 926 F2d 918, 919-20 (9th Cir 1991);
13 Middleton v Cupp, 768 F2d 1083, 1085 (9th Cir 1985), cert denied,
14 478 US 1021 (1986).

3

15
16
17 Petitioner offers no basis in federal law to question the
18 California court of appeal's finding that the evidence that
19 petitioner had premeditated the intended killing of Miller could be
20 used by the jury to find premeditation in the killing of the actual
21 victim, Jackson. Absent assertion of a constitutional or statutory
22 violation, the court has no jurisdiction to engage in collateral
23 review of the state court's evidentiary ruling. See Pulley, 465 US
24 at 41. Thus, the court must assess this particular claim under the
25 assumption that the first premise of petitioner's argument fails.

26 Because the court's acceptance of the first premise of
27 petitioner's argument is a precondition to the court reaching the
28 second premise, the claim fails in its entirety.

V

For the foregoing reasons, the petition for a writ of habeas corpus is DENIED.

The clerk shall enter judgment in favor of respondent and close the file.

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Chief Judge